



**BILLING CODE: 4810-AM-P**

**BUREAU OF CONSUMER FINANCIAL PROTECTION**

**[Docket No. CFPB-2012-0036]**

**Electronic Fund Transfers; Determination of Effect on State Laws (Maine and Tennessee)**

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Notice of preemption determination.

**SUMMARY:** The Bureau of Consumer Financial Protection (Bureau) is publishing a final determination as to whether certain laws of Maine and Tennessee relating to unclaimed gift cards are inconsistent with and preempted by the Electronic Fund Transfer Act and Regulation E. The Bureau has determined that it has no basis for concluding that the provisions at issue in Maine's unclaimed property law relating to gift cards are inconsistent with, or therefore preempted by, Federal law. As discussed below, however, the Bureau has determined that one provision in Tennessee's unclaimed property law relating to gift cards is inconsistent with, and therefore preempted by, Federal law.

**DATES:** The determination is effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Courtney Jean or Terry Randall, Office of Regulations, at (202) 435-7700.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Electronic Fund Transfer Act (EFTA), as amended by the Credit Card Accountability and Responsibility and Disclosure Act of 2009, and as implemented by the Bureau's Regulation E, provides that the Bureau shall make a preemption determination upon its

own motion, or upon the request of any State, financial institution, or other interested party, as to whether any inconsistency exists between the EFTA and State law “relating to,” among other things, “expiration dates of gift certificates, store gift cards, or general-use prepaid cards.”<sup>1</sup> The EFTA preempts such a State law only to the extent of any inconsistency.<sup>2</sup> Furthermore, a State law is not considered inconsistent with the EFTA if the State law affords consumers greater protection than the EFTA.<sup>3</sup> Regulation E specifies that State law is inconsistent with the requirements of the EFTA and Regulation E if, among other things, the State law “*requires or permits* a practice or act prohibited by the federal law.”<sup>4</sup>

The Bureau received three requests for determinations as to whether provisions in the EFTA and Regulation E (referred to hereinafter simply as “Federal law”) relating to gift card expiration dates preempt certain unclaimed property law provisions in Maine, Tennessee, and New Jersey relating to gift cards.<sup>5</sup> The Bureau published a notice of intent to make a preemption determination (the Notice) seeking public comment on the Maine and Tennessee requests on August 21, 2012.<sup>6</sup> As stated in the Notice, the Bureau’s view is that the New Jersey request has been rendered moot by a subsequent change in State law, and the Bureau therefore is not issuing a response.<sup>7</sup> The Bureau has reviewed the public comments received concerning Maine’s and

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<sup>1</sup> 15 U.S.C. 1693q; 12 CFR 1005.12(b).

<sup>2</sup> 15 U.S.C. 1693q.

<sup>3</sup> *Id.*

<sup>4</sup> 12 CFR 1005.12(b) (emphasis added).

<sup>5</sup> The requests relating to New Jersey’s and Tennessee’s laws came from payment card industry representatives. Maine’s Office of the State Treasurer submitted a request relating to Maine’s law to the Board of Governors of the Federal Reserve System. The Board did not respond to Maine’s request before the Board’s powers and duties relating to consumer financial protection functions transferred to the Bureau on July 21, 2011. The Bureau thus inherited responsibility for responding to Maine’s pending request. The Maine, Tennessee, and New Jersey requests are available for public inspection and copying, consistent with the Bureau’s rules on disclosure of records and information. See 12 CFR Part 1070.

<sup>6</sup> 77 FR 50404.

<sup>7</sup> The New Jersey request sought a determination as to whether Federal law preempted the application to gift cards of New Jersey’s unclaimed property law, which deemed gift cards abandoned after two years of nonuse. On June 29, 2012, however, New Jersey amended its unclaimed property law to lengthen the period of nonuse after which a gift card would be presumed abandoned from two years to five years. In response to the Notice, certain commenters

Tennessee's laws in response to the Notice and has conducted additional outreach to inform its analysis. The Bureau is now publishing a final determination that it has no basis for concluding that the provisions at issue in Maine's Uniform Unclaimed Property Act (the Maine Act) relating to gift cards are inconsistent with, or therefore preempted by, the EFTA or Regulation E. As discussed below, however, the Bureau finds that one provision in Tennessee's unclaimed property law, § 66-29-116 of Tennessee's Uniform Disposition of Unclaimed (Personal) Property Act (the Tennessee Act), when applied to gift cards, is inconsistent with the EFTA and Regulation E and therefore is preempted.

## **II. The EFTA and Regulation E**

Regulation E, which implements the EFTA, generally prohibits any person from selling or issuing a gift certificate, store gift card, or general-use prepaid card with an expiration date unless certain conditions are met.<sup>8</sup> First, the person must have established policies and procedures to ensure that consumers have a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expires.<sup>9</sup> Second, the expiration date for the underlying funds must be at least the later of (i) five years after the date the certificate or card was issued (or, in the case of a reloadable card, five years after the date that funds were last loaded onto the card) or (ii) the card's expiration date, if any.<sup>10</sup> Third, the terms of expiration (including whether, and if so when, the underlying funds expire) must be disclosed on the card, along with certain other information.<sup>11</sup> Finally, no fee or charge may be imposed on the cardholder for replacing the gift certificate or card prior to the funds' expiration

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urged the Bureau to issue a determination with respect to New Jersey notwithstanding the intervening amendment to State law. However, the Bureau continues to view the original request as moot and therefore is not issuing a response.

<sup>8</sup> 15 U.S.C. 1693l-1(c); 12 CFR 1005.20(e).

<sup>9</sup> 12 CFR 1005.20(e)(1).

<sup>10</sup> 12 CFR 1005.20(e)(2).

<sup>11</sup> 12 CFR 1005.20(e)(3).

date, unless the certificate or card has been lost or stolen.<sup>12</sup>

The EFTA and Regulation E generally define a gift certificate, store gift card, and general-use prepaid card to mean a card, code, or other device that, in exchange for payment, is issued to a consumer in a specified amount primarily for personal, family, or household purposes, and that is redeemable upon presentation for goods or services.<sup>13</sup> In some cases, the amount on store gift cards or general-use prepaid cards (but not on gift certificates) may be increased or reloaded.<sup>14</sup> Certain categories of devices—notably gift certificates that are issued in paper form only and reloadable cards that are not marketed or labeled as gift cards or gift certificates—are not treated as gift certificates, store gift cards, or general-use prepaid cards for purposes of the EFTA or Regulation E.<sup>15</sup> For ease of reference, the gift certificates, store gift cards, and general-use prepaid cards covered by the expiration date provisions of the EFTA and Regulation E are referred to herein as “gift cards.”

### **III. Overview of States’ Unclaimed Property Laws as Applied to Gift Cards**

States’ unclaimed property laws set forth specific periods of time after which particular categories of unclaimed personal property are deemed “abandoned” and custody of such property must be transferred from the entity holding the property to the State.<sup>16</sup> In some States, gift certificates or cards (“gift cards”) are one such category of property. The categories of gift cards

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<sup>12</sup> 12 CFR 1005.20(e)(4). Thus, for example, a consumer may not be charged a fee to replace an expired card if the funds underlying that card have not yet expired.

<sup>13</sup> 15 U.S.C. 1693l-1(a)(2); 12 CFR 1005.20(a). Specifically, gift certificates and store gift cards are redeemable upon presentation at a single merchant or an affiliated group of merchants for goods or services. 15 U.S.C. 1693l-1(a)(2)(B)-(C); 12 CFR 1005.20(a)(1)-(2). General-use prepaid cards are redeemable upon presentation at multiple, unaffiliated merchants or may be used at automated teller machines. 15 U.S.C. 1693l-1(a)(2)(A); 12 CFR 1005.20(a)(3).

<sup>14</sup> 15 U.S.C. 1693l-1(a)(2); 12 CFR 1005.20(a).

<sup>15</sup> See 15 U.S.C. 1693l-1(a)(2)(D); 12 CFR 1005.20(b). The other categories of excluded devices are those useable solely for telephone services; loyalty, award, or promotional gift cards; cards not marketed to the general public; and cards redeemable solely for admissions to events or venues. See *id.*

<sup>16</sup> Unclaimed property laws refer to the person or entity that transfers unclaimed property to the State as the “holder.” In general, the “holder” is the person that is in possession of the property, or that is indebted or required to make payment to the owner of the property. See, e.g., 33 M.R.S. § 1952.6 (2011); Tenn. Code Ann. § 47-18-127(e) (2012).

covered by States' unclaimed property laws vary depending on the State, as does the length of time that a gift card must remain unclaimed before being deemed abandoned. As discussed in detail in Part V of this determination, both the Maine and Tennessee Acts deem certain categories of gift cards that are subject to the expiration-date provisions of the EFTA and Regulation E to be abandoned property as early as two years after purchase. Once a gift card has been deemed abandoned, some or all of the unused value on the card then must be transferred to the State, pursuant to procedures that, once again, vary by State.<sup>17</sup>

According to rules of priority articulated by the Supreme Court, unclaimed intangible property (*i.e.*, including the unused value on gift cards) is presumptively subject to being transferred to the State of the last known address of the property owner. If that State does not provide for the transfer of the category of property at issue, or if the property owner's address is unknown, then custody is due to be transferred to the State of incorporation of the entity that is obligated to make payment on the property.<sup>18</sup> The Bureau understands that for gift cards, the address of the owner (*i.e.*, the recipient) typically is unknown, and the entity obligated to make payment on the property typically is the entity that issued the gift card.<sup>19</sup>

When unused gift card value transfers to a State, the State takes custody of the property on behalf of the gift card owner. If the gift card owner thereafter seeks to use the card, State law typically permits—but does not necessarily require—the gift card issuer to honor the card and to

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<sup>17</sup> States' unclaimed property laws generally provide that the abandoned property is the gift card itself. However, the physical gift card is not transferred to the State because, at the time of abandonment, the gift card is not in the issuer's possession. Instead, the unused value on the card is transferred. Some states require transfer of the entire unused value, while others require transfer of only a portion (*e.g.*, 60 percent) of the unused value. For ease of reference, the Bureau herein characterizes the property that is being transferred to the State as the "unused gift card value."

<sup>18</sup> See *Delaware v. New York*, 507 U.S. 490 (1993).

<sup>19</sup> In some circumstances, some other entity might be the "holder" of a gift card for purposes of State unclaimed property law; however, for ease of reference herein the Bureau refers to the gift card issuer as the holder. The Bureau's determinations with respect to the Maine and Tennessee Acts do not depend on what entity is the holder of a gift card.

seek reimbursement from the State. If the gift card issuer opts not to honor the card, the gift card owner can contact the State to attempt to reclaim the property.

The Bureau believed at the time that it issued the Notice that both the Maine and Tennessee Acts fit the general model described above. The Bureau subsequently received information indicating that the Maine Act in fact requires gift card issuers to honor gift cards indefinitely, even after the unused gift card value is transferred to the State. Details concerning the Maine and Tennessee Acts as applied to gift cards, including where they differ from the general approach set forth above, are discussed in Part V.

#### **IV. Summary of Comments**

The Bureau solicited public comment on all aspects of its Notice, including on the application of the Maine and Tennessee Acts to gift cards, on the nature of any inconsistency between those laws and the expiration date provisions of the EFTA and Regulation E, and in particular on whether either of the Acts affords consumers greater protection than Federal law. The Bureau received 20 comments in response to the Notice, including two comments from consumer advocacy groups and 18 comments from gift card issuers and trade associations. All of the commenters stated that the Maine and Tennessee Acts as applied to gift cards conflict with Federal law, that they are not more protective of consumers, and that the Bureau should determine that they are preempted.<sup>20</sup> In general, commenters did not distinguish between the specifics of the Maine and Tennessee Acts. The comments thus are summarized in a general manner below.

##### **A. Whether State Law Conflicts with Federal Law**

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<sup>20</sup> All but two of the commenters interpreted the Maine Act, as the Bureau did in its Notice, to permit issuers to decline to honor abandoned gift cards. Thus, the bulk of the comments did not factor into their analysis of Maine law a provision of the Maine Act that requires an issuer to continue to honor gift cards even after the issuer has transferred their unused value to the State. *See* Part V.

In general, industry commenters stated that the Maine and Tennessee Acts as applied to gift cards conflict with the expiration date provisions of the EFTA and Regulation E. They also discussed the burdens of complying with both State and Federal law.

Most industry commenters stated that any requirement to transfer the unused value on a gift card to a State as soon as two years after card issuance conflicts with Federal law because it imposes inconsistent requirements on card issuers. The commenters noted that Federal law prohibits a person from selling or issuing a gift card with an expiration date unless the card and its underlying funds will not expire for a minimum of five years. However, pursuant to both the Maine and Tennessee Acts, issuers must transfer unused gift cards' value (*i.e.*, the underlying funds) to the State as soon as two years after issuance. The commenters stated that the Maine and Tennessee Acts and Federal law thus impose conflicting obligations on issuers to continue to honor gift cards when they have already transferred the gift card value to the State.

Other industry commenters noted that the States' gift card abandonment periods can act as *de facto* expiration dates, because consumers are unlikely to recover their property if the issuer opts not to honor the gift cards after transferring their unused value to the State. Similarly, several industry commenters noted that Maine's and Tennessee's abandonment periods conflict with Federal disclosure requirements for gift cards, which provide that any expiration date must be printed on the card (*i.e.*, if no expiration date is printed, then the card cannot expire). The commenters stated that, because the Maine and Tennessee Acts require gift card issuers to transfer unused gift cards' value to the State before any disclosed expiration date, the Acts have the potential to create an undisclosed, *de facto* expiration date that conflicts with what is printed on the card.

In light of these arguments, industry commenters urged the Bureau to determine that the EFTA and Regulation E preempt the Maine and Tennessee Acts insofar as those Acts require transfer of unused gift cards' value sooner than the expiration date that Federal law would permit (*i.e.*, a minimum of five years or a card's expiration date, if any). Some industry commenters stated that compelling issuers to comply with both the Federal expiration date provisions and the Maine and Tennessee Acts subjects issuers to conflicting claims from States and consumers. These commenters stated that requiring issuers to honor cards and then seek reimbursement from the State raises constitutional due process concerns. Other commenters stated that it is impossible for issuers subject to the Maine or Tennessee Acts to comply with both Federal and State law as they currently exist, or that complying with both laws imposes a significant and unfair burden on issuers and could cause issuers to charge higher fees or offer fewer card types.<sup>21</sup> A few commenters noted that compelling issuers to comply with both Federal and State laws could lead to inappropriate windfalls to States. One trade association, on the other hand, stated that requiring issuers to honor abandoned cards would not significantly increase the burden on issuers, because the majority of issuers currently honor gift cards to preserve customer relationships, even if the cards' unused value has been turned over to a State.

One commenter, a consumer group, identified a different kind of conflict between Federal and State law. This commenter stated that an inconsistency arises from the issuer's option to decline to honor the card before the card may expire under Federal law. The commenter thus urged the Bureau to determine that the EFTA and Regulation E preempt State law, but only insofar as State law purports to allow issuers to decline to honor cards sooner than the cards are permitted to expire under Federal law. The commenter noted that, under this

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<sup>21</sup> As noted above, most commenters appeared not to realize that the Maine Act itself requires issuers to honor gift cards even after transferring their unused value to the State.



approach, consumers would receive both the full protection of Federal law and whatever benefits might flow from having their unused gift cards' value transfer to the State. The commenter further stated that it would be less burdensome for issuers to request reimbursement from the State after transferring the unused value than it would be for consumers to retrieve their unclaimed property directly from the State. The commenter reasoned that issuers could request reimbursement at regular intervals, *e.g.* annually, and that issuers would have little difficulty establishing their right to reimbursement.

### **B. Whether State Law Is More Protective of Consumers**

Under the EFTA, even if there is a conflict between State law and the EFTA and Regulation E, State law is not inconsistent with the Federal law for purposes of a preemption analysis if it offers greater protections to consumers than the EFTA.<sup>22</sup> However, no commenters argued that the Maine and Tennessee Acts are more protective of consumers than Federal law. Most commenters argued that Federal law is more protective of consumers than the Maine and Tennessee Acts, and two commenters stated that Maine law is equally protective of consumers as Federal law.

Those commenters who stated that Federal law is more protective of consumers cited the fact that, under Federal law, consumers are guaranteed the ability to redeem their gift cards at the point-of-sale for at least three years longer than under State law.<sup>23</sup> Both consumer group commenters, however, stated that whether Federal law is more protective depends on whether State law requires issuers to honor cards for the entire period required by Federal law. Similarly, the two commenters, both trade associations, who stated that Maine law is equally protective of consumers, reached that conclusion because, they said, Maine law prohibits expiration dates for

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<sup>22</sup> 15 U.S.C. 1693q.

<sup>23</sup> As noted, all but two commenters interpreted the Maine Act, as the Bureau did in its Notice, to permit issuers to decline to honor gift cards after transferring the cards' unused value to the State.

gift cards. Thus, according to these commenters, under Maine law, gift cards must be honored by the retailer whenever presented, even if their unused value has already transferred to the State.

Commenters unanimously agreed that a State law that would force consumers to retrieve their unused gift cards' value from the State, rather than from the issuers, would be less protective than Federal law. The commenters believed that consumers would not often succeed in reclaiming their property (or would not even try), due to the lengthy and confusing process that they would need to navigate. For example, commenters stated that a consumer would need to (1) know that a card had been deemed abandoned and that the issuer had transferred the unused card value to a State, (2) identify the State that is holding the property, which is based on information not usually known to consumers (*e.g.*, information reported to the State by the issuer and the issuer's State of incorporation), and (3) establish ownership of the property, which could be difficult because gift card owners typically are unknown to the issuer and thus not reported to the State.

The Notice solicited comment on whether gift cards' unused value would be better protected in the custody of the State where, for example, the unused value potentially could be protected from inactivity fees, issuer bankruptcy, and expiration, or could be converted to cash for the consumer. No commenters believed that any such benefits (even assuming they occurred) would outweigh the protections provided to consumers by Federal law. Certain industry commenters noted that the potential for harm to consumers from inactivity fees or issuer bankruptcy is low because inactivity fees are rare, the risk of bankruptcy is remote, and consumers have other protections against such harms. Other commenters disputed that a two-year abandonment period benefits consumers by providing them the indefinite ability to retrieve their gift cards' unused value from the State. These commenters noted the procedural challenges

discussed above. They also stated that consumers would receive the same benefit (if any) if the cards' value transferred to the State after five years of dormancy. Two issuers commented that the right to receive cash is not more protective of consumers because consumers expect to obtain merchandise, not cash, from the purchase of gift cards.

A handful of commenters urged the Bureau to determine that the EFTA and Regulation E preempt *any* State unclaimed property law pursuant to which a gift card is presumed abandoned any earlier than the earliest possible expiration permissible under Federal law. These commenters cited the benefits of a uniform, national approach. For example, one issuer stated that uniform, national standards promote stability in the financial system and protect consumers and industry from the compliance costs associated with State-by-State regulation. One trade association added that uniform, national standards reduce confusion, especially because many issuers may also be subject to other Federal regulations.

## **V. Final Determinations**

*Maine.* The Office of the State Treasurer of the State of Maine requested a determination as to whether and how the EFTA and Regulation E's provisions relating to gift card expiration dates preempt the Maine Act as applied to gift cards. After considering the relevant provisions of the EFTA and Regulation E, the Maine Act, public comments received, and further analysis, the Bureau has determined that it has no basis for concluding that the Maine Act as applied to gift cards is inconsistent with the EFTA and Regulation E or, therefore, that it is preempted.

Several provisions of the Maine Act are relevant to understanding the treatment of gift cards as abandoned property in Maine. First, § 1953 of the Maine Act provides that a gift obligation or stored-value card is presumed abandoned two years after the later of December 31 of the year in which the obligation arose or the most recent transaction involving the obligation

or stored-value card occurred, including the initial issuance and any subsequent addition of value to the obligation or stored-value card.<sup>24</sup> (For ease of reference, the gift obligations covered by the Maine Act are referred to herein as “gift cards.”) Section 1953 of the Maine Act further provides that a period of limitation may not be imposed on an owner’s right to redeem a gift card.<sup>25</sup> Under § 1958, holders of property that Maine presumes to be abandoned as of the end of a calendar year must report and transfer the property to Maine by May 1 of the following year.<sup>26</sup> Finally, § 1961 provides that Maine thereafter assumes custody of and responsibility for the property, and a business that has transferred such property to the State is relieved of all liability arising thereafter with respect to it.<sup>27</sup> Section 1961 further states that if a business chooses to make payment to the owner of the property, it may request reimbursement by filing a request with the State.<sup>28</sup>

The Bureau’s determination with respect to the Maine Act relies on the Bureau’s communications with the Office of the State Treasurer for the State of Maine, which interprets and administers Maine’s unclaimed property law. Maine’s Office of the State Treasurer has advised the Bureau that, properly interpreted, the Maine Act requires a holder to continue to honor a gift card that has been presumed abandoned pursuant to the Act. The Treasurer similarly has explained that Maine does not fulfill consumers’ direct requests to claim their property.

Instead, if a consumer is directed to the State, the State re-directs the consumer to the gift card

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<sup>24</sup> 33 M.R.S. § 1953.G(2) (2011). The terms “gift obligation” and “stored value card” are defined in detail in the Maine Act and may differ in some respects from the terms “gift certificates, store gift cards, or general-use prepaid cards” as used in the EFTA. *Id.* § 1952.5-A (gift obligation); § 1952.15-A (stored-value card). Under the Maine Act, “prefunded bank cards,” which generally include cards issued by a financial organization and that are usable at multiple merchants, are deemed abandoned after three years of non-use. *Id.* § 1952.12-A; § 1953.G-1.

<sup>25</sup> *Id.* § 1953.G(3) (“A period of limitation may not be imposed on the owner’s right to redeem the gift obligation or stored-value card.”).

<sup>26</sup> *Id.* § 1958. Under the Maine Act, only 60 percent of a gift card’s face value is reportable as unclaimed property. *Id.* § 1953.G(1). In addition, a gift card sold on or after December 31, 2011, is not presumed abandoned if it was among those sold by an issuer that sold no more than \$250,000 in gift cards during the preceding calendar year. *Id.* § 1953.G(2).

<sup>27</sup> *Id.* § 1961.2.

<sup>28</sup> *Id.*

issuer and informs the issuer of its obligation to honor the card. There is some apparent tension between an issuer's continuing obligation under § 1953 of the Maine Act to honor abandoned gift cards whose unused value has transferred to the State, and the more general provision in § 1961 that provides abandoned property holders the option of whether to make payment to property owners after the property has transferred to the State. However, the Bureau's determination with regard to the Maine Act is based on the interpretation of Maine law that the Treasurer has presented.

Thus, under the Maine Act, as explained by the State's Treasurer, an issuer that has transferred the unused value on an abandoned gift card to the State must honor the gift card on presentation indefinitely, and may then request reimbursement from the State. Because the Maine Act does not interfere with consumers' ability to use their gift cards at the point-of-sale for at least as long as they are guaranteed that right by the EFTA and Regulation E, the Bureau has determined that it has no basis for concluding that the provisions in Maine's unclaimed property law relating to gift cards are inconsistent with, or therefore preempted by, Federal law.<sup>29</sup>

In reaching its determination, the Bureau considered commenters' concerns about the burden of being required to comply both with the expiration date provision of the EFTA and the abandonment provisions of the Maine Act. The Bureau notes, however, that the Maine Act itself requires abandoned gift cards to be honored indefinitely, a fact that these commenters generally did not recognize. The Bureau also considered certain commenters' concerns that requiring an issuer to honor abandoned gift cards and then seek reimbursement, as the Maine Act does, would raise constitutional due process issues. The Bureau expresses no view on these comments,

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<sup>29</sup> As noted, the Bureau's determination with respect to the Maine Act reflects the Bureau's understanding of how the Maine Act currently operates and is based on communications with Maine's Office of the State Treasurer. If legislative, judicial, or other official action effected a relevant change in how Maine law applied to gift cards, the Bureau could revisit its determination.

because the Bureau's role is limited to determining whether any provisions of the Maine Act as applied to gift cards are inconsistent with the EFTA, not whether Maine's law is constitutional.

*Tennessee.* Payment card industry representatives requested that the Bureau issue a preemption determination as to whether the Tennessee Act is inconsistent with the requirement under the EFTA and Regulation E that gift cards and their underlying funds not expire sooner than five years after the date on which funds are last loaded onto the card. After considering the relevant provisions of the EFTA and Regulation E, the Tennessee Act, public comments received, and further analysis, the Bureau has determined that one provision in Tennessee's unclaimed property law, § 66-29-116 of the Tennessee Act, as applied to gift cards, is inconsistent with the EFTA and Regulation E and therefore is preempted.

As with Maine, several provisions of the Tennessee Act are relevant to understanding the treatment of gift cards as abandoned property in Tennessee. First, the Tennessee Act provides that a "gift certificate" issued in the ordinary course of an issuer's business is presumed abandoned if it remains unclaimed by the owner upon the *earlier* of: (1) the expiration date of the certificate; or (2) two years from the date the certificate was issued.<sup>30</sup> Pursuant to Tennessee's Consumer Protection Act, the term "gift certificate" excludes prepaid cards usable at multiple, unaffiliated merchants or at automated teller machines (*i.e.*, "open-loop" gift cards).<sup>31</sup> In addition, a gift certificate is exempt from the Tennessee Act if the issuer of the certificate does not impose a dormancy charge and the gift certificate (1) conspicuously states

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<sup>30</sup> *Id.* § 66-29-135(a)(1)-(2). Because, pursuant to the EFTA and Regulation E, gift cards sold since August 2010 may not expire sooner than five years after they are issued, the Bureau understands that § 66-29-135 of the Tennessee Act effectively provides for a two-year abandonment period for such categories of cards.

<sup>31</sup> Pursuant to Tennessee's Consumer Protection Act, the term "gift certificate" also excludes prepaid telephone calling cards and certain other categories of cards not distributed to the general public. Tenn. Code Ann. § 47-18-127(d)-(e) (2012). Aside from the exclusion for "open-loop" gift cards and prepaid telephone calling cards, the Bureau believes that "gift certificate" for purposes of Tennessee law generally includes gift cards and other similar electronic devices. However, the scope of Tennessee's definition of "gift certificate" may differ in some respects from that of "gift card" as used elsewhere in this determination.

that the gift certificate does not expire; (2) bears no expiration date; or (3) states that any expiration date is not applicable in Tennessee.<sup>32</sup> In short, the Bureau understands that the Tennessee Act requires issuers to transfer to the State the unused value on most closed-loop gift certificates that carry dormancy charges and may expire. The Bureau's determination applies to the Tennessee Act only to the extent that the gift certificates covered by the Act overlap with the categories of gift cards for which the EFTA and Regulation E restrict expiration dates. For ease of reference, such products are referred to herein as "gift cards."

An issuer of gift cards that Tennessee presumes to be abandoned as of the end of a calendar year must report and transfer the unused cards' value to Tennessee by May 1 of the following year.<sup>33</sup> Under § 66-29-116 of the Tennessee Act, Tennessee thereafter assumes custody and responsibility for the property, and the person that transferred the unused gift card value to the State is relieved of all liability to the extent of the value transferred for any claim that may later arise with respect to the property. Section 66-29-116 further provides that a person that has transferred gift cards' unused value to Tennessee may elect to honor the cards and may request reimbursement by filing a request with the State.

Thus, unlike the Maine Act, the Tennessee Act does not require issuers to honor abandoned gift cards after issuers have transferred the cards' unused value to Tennessee. The Bureau thus understands that, if an issuer were to decline to honor the gift cards, as permitted by § 66-29-116, consumers could attempt to reclaim their property by submitting an unclaimed property claim form to Tennessee's Department of Treasury. To properly submit an effective

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<sup>32</sup> *Id.* § 66-29-135(c).

<sup>33</sup> *Id.* § 66-29-113(e). The value presumed abandoned is the price paid by the purchaser, except that for gift certificates issued after December 31, 1996, and redeemable in merchandise only, the value presumed abandoned is 60 percent of the purchase price. *Id.* § 66-29-135(b). The Bureau notes that a Tennessee trial court held in 2001 that Tennessee law requires transfer only of the right to claim merchandise by using the gift card (*i.e.*, not a transfer of the unused value). *Service Merchandise Co. v. Adams*, No. 97-2782-III, 2001 WL 34384462 (Tenn. Ch. Ct. June 29, 2001). However, the Tennessee Department of Treasury's Unclaimed Property Division has informed the Bureau that Tennessee requires the transfer of the unused value.

claim, consumers would need to determine that Tennessee is the appropriate State to contact and would need to establish ownership of the property by supplying sufficient documentation to the State. Consumers then most likely would need to wait at least several weeks to receive their property.<sup>34</sup>

The Bureau finds that § 66-29-116 of the Tennessee Act as applied to gift cards is inconsistent with the EFTA and Regulation E and therefore is preempted. Specifically, the Bureau finds that § 66-29-116 of the Tennessee Act is inconsistent with Federal law because, by permitting issuers to decline to honor gift cards as soon as two years after issuance and relieving them of liability to consumers for the property, the effect of this provision is to permit cards and their underlying funds to expire sooner than is permitted under the EFTA and Regulation E. Section 66-29-116 of the Tennessee Act thus permits an act or practice that is prohibited by the Federal law.

In reaching this conclusion, the Bureau has considered whether § 66-29-116 of the Tennessee Act, as applied to gift cards, is more protective of consumers than Federal law. The Bureau has concluded that it is not, because the Bureau has not identified any consumer benefit flowing from an issuer's ability to decline a gift card at the point-of-sale sooner than the card and its underlying funds are permitted to expire under Federal law. The Bureau notes that any benefits a consumer might experience from having a gift card treated as abandoned property would result from the transfer of the unused gift card value to the State, not from an issuer's declining to honor the card.<sup>35</sup>

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<sup>34</sup> See Tennessee Department of Treasury Unclaimed Property, Frequently Asked Questions, <http://treasury.tn.gov/unlcaim/faq/html>.

<sup>35</sup> Similarly, the Bureau concludes that its determination that § 66-29-116 of the Tennessee Act is not more protective of consumers than the EFTA and Regulation is not inconsistent with the judicial decision discussed in the Bureau's Notice. That case, in which the U.S. Court of Appeals for the Third Circuit upheld a decision by the U.S. District Court for the District of New Jersey that declined to preliminarily enjoin the application to gift cards of New Jersey's unclaimed property law, weighed the benefits to consumers of New Jersey's unclaimed property scheme for



For the reasons stated above, the Bureau finds that the Tennessee Act is inconsistent with the EFTA and Regulation E and therefore is preempted to the extent that it permits issuers to refuse to honor gift cards sooner than the gift cards and their underlying funds are permitted to expire under Federal law.<sup>36</sup> In reaching this determination, the Bureau acknowledges commenters' concerns that the requirement both to transfer the unused value from abandoned gift cards to the State while at the same time complying with the EFTA and Regulation E imposes possibly burdensome obligations on gift card issuers. However, the primary concern of the relevant provision of the EFTA is to ensure that consumers will be able to use their gift cards for the prescribed periods of time. So long as consumers can continue to use their cards at the point-of-sale for as long as Federal law guarantees, the fact that issuers may face an increased burden or cost to comply with both Federal law and the Tennessee Act—at least to the degree of burden the commenters discussed—does not change the Bureau's conclusion. Also, as with Maine, the Bureau expresses no opinion on the constitutional due process concerns raised by certain commenters, because the Bureau's role is solely to determine whether State law is inconsistent with the requirements of the EFTA and Regulation E, not to determine whether State law is constitutional. In this regard, the Bureau notes that its determination is limited to the conclusion that § 66-29-116 of the Tennessee Act, as applied to gift cards, is preempted, and the

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gift cards. In finding that the plaintiffs were unlikely to prove that Federal law preempted New Jersey's unclaimed gift card law, the court emphasized several possible benefits to consumers of having their unused gift card value transfer to the State that, in the court's view, weighed in favor of a conclusion that New Jersey law was more protective of consumers than the EFTA and Regulation E. *See N.J. Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012), *reh'g denied* (3d Cir. Feb. 24, 2012). Because the Bureau's preemption determination with respect to Tennessee law applies to the provision of Tennessee law that permits issuers to decline to honor abandoned gift cards at the point-of-sale, rather than to the provision that requires unused gift card value to be transferred to the State, the purported benefits of any such transfer are not germane to the Bureau's decision.

<sup>36</sup> The Bureau's determination with respect to the Tennessee Act reflects the Bureau's understanding of how the Tennessee Act currently operates and is based in part on communications with the Tennessee Department of Treasury's Unclaimed Property Division. If legislative, judicial, or other official action effected a relevant change in how Tennessee law applied to gift cards, the Bureau could revisit its determination.

Bureau does not otherwise opine on how the Tennessee Act should apply to gift cards in light of this determination.

This is an official staff interpretation of Regulation E, issued pursuant to § 1005.12(b) of Regulation E. The Bureau believes that the nuances of States' unclaimed property laws warrant independent consideration of whether a particular State's unclaimed property law as applied to gift cards is inconsistent with and preempted by the EFTA and Regulation E. Thus, notwithstanding certain commenters' requests that the Bureau set forth a uniform, national standard, this determination is limited to the facts and issues discussed above and does not constitute a determination with respect to the laws of any other States.

### **List of Subjects**

#### *12 CFR Part 1005*

Banking, Banks, Consumer protection, Credit unions, Electronic fund transfers, National banks, Remittance transfers, Reporting and recordkeeping requirements, Savings associations.

### **Preemption determination**

The following order sets forth the preemption determination, which also will be reflected in Supplement I to Part 1005—Official Interpretations.

### **Order**

Pursuant to § 1639q of the Electronic Fund Transfers Act (EFTA) and § 1005.12(b) of Regulation E, the Bureau has determined that § 66-29-116 of Tennessee's Uniform Disposition of Unclaimed (Personal) Property Act (the Tennessee Act) is preempted by the EFTA and Regulation E to the extent that the Tennessee Act permits gift certificates to be declined at the point-of-sale sooner than the gift certificates and their underlying funds are permitted to expire under § 1005.20(e) of Regulation E. The Bureau's determination applies only with respect to

those devices that are gift certificates, store gift cards, and stored-value cards, as defined in 12 CFR § 1005.20(a), and are also covered by the Tennessee Act.

Dated: April 19, 2013.

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**Richard Cordray,**

*Director, Bureau of Consumer Financial Protection.*

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